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No. 84-268

In the Supreme Court of the United States

OCTOBER TERM, 1984

A-1 KING SIZE SANDWICHES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board was warranted in finding that petitioner was not seeking in good faith to reach agreement with the Union and that petitioner accordingly violated its obligation to bargain in good faith within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A18) is reported at 732 F.2d 872. The decision and order of the National Labor Relations Board (Pet. App. A19-A59) is reported at 265 N.L.R.B. 850.

JURISDICTION

The judgment of the court of appeals (Pet. App. A3-A4) was entered on May 21, 1984. The petition for a writ of certiorari was filed on August 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2.

STATEMENT

1. Petitioner produces sandwiches and pies on an assembly line at its facility in Orlando, Florida, and it sells and delivers those items to convenience stores (Pet. App. A8, A24). In 1979, petitioner's employees, in a unit consisting of some 50 to 60 production and maintenance employees, truck drivers, and shipping helpers, voted to be represented by the Hotel, Motel, Restaurant Employees and Bartenders Union, Local No. 737 (the Union). Petitioner unsuccessfully challenged the Board's certification of the Union through a refusal to bargain; and in January 1981, after the Board's order was upheld by the court of appeals, petitioner and the Union commenced a series of negotiating sessions for a collective bargaining agreement. *Id.* at A8-A9, A25.

During 18 sessions occurring over an 11-month period, petitioner and the Union each presented proposals on a number of subjects, but agreement was reached only as to a union recognition clause, clauses governing rights, duties, and other matters concerning Union representatives, pay when on jury duty, leaves of absence, rules for the Union's access to plant bulletin boards, and an arbitration and grievance procedure for any matters made subject to such a procedure (Pet. App. A9, A25-A26). As to other subjects, petitioner rejected various tradeoffs proposed by the Union in the next-to-last meeting, held in September 1981; and, in a letter dated September 30, petitioner reiterated its proposals on the sig-

nificant subjects dividing the two sides and stated that no modified proposals were contemplated. No new proposals were thereafter offered by petitioner. *Id.* at A30, A32, A33, A35-A36, A37-A38, A41, A44-A45.

The proposals on which petitioner insisted included a management rights clause that asserted petitioner's control over a long list of enumerated subjects and over every right and power petitioner had ever enjoyed, except insofar as any limit was established by an express and specific term of the agreement (Pet. App. A12-A13, A29-A30, A60-A62). This final clause on which petitioner insisted was more extensive in its coverage than the clause petitioner initially proposed (*id.* at A16, A29). The procedures for grievance processing and arbitration applied to no significant action affecting employees. This was so because of petitioner's refusal to agree to a nondiscrimination clause or a discharge and discipline clause and petitioner's insistence that any clauses on wages, layoffs or recalls acknowledge its sole discretion (*id.* at A12-A13, A14-A15, A33-A38, A50). Petitioner's representatives stated during the course of bargaining that subjecting disciplinary matters to a grievance procedure was unnecessary because management had an "open door" policy pursuant to which employees could discuss their problems directly with the executive vice-president and because, in any event, no employees had ever complained about unfair discipline (see *id.* at A50 n.18; Tr. 34).

Petitioner insisted on a no-strike clause that prohibited "any strike, either primary or sympathy, slowdown, boycott, picketing, or other work interruptions, for any reasons, including but not limited to, alleged or actual unfair labor practices" (Pet. App.

A32-A33). Petitioner also insisted on an "exclusiveness," or "zipper," clause in which the parties would waive, during the life of the agreement, any right to bargain on any subject that "could be interpreted under existing law as a mandatory or permissive subject of bargaining" (*id.* at A13-A14, A30-A32). This clause, too, was broader than petitioner's initially proposed zipper clause (*id.* at A16, A31, A32). Petitioner also declined to consider the inclusion of any provision for union dues checkoff (*id.* at A15, A41).

Regarding wages, petitioner declined to make any proposal for a general wage increase; instead it insisted on continuing its established system of semi-annual merit wage reviews.[1] Under petitioner's wage proposal, a Union representative could participate by sitting in on each employee's wage review, but petitioner would make the final decision. Petitioner would be barred, during the term of the agreement, from reducing an employee's wages below his or her hourly rate as of the agreement's execution, but nothing in petitioner's proposed agreement would bar petitioner from taking away previously awarded merit increases at will, so long as the employee's wage rate did not sink below that initial baseline. Pet. App. A11, A42-A46.

2. The Board, adopting the decision of the Administrative Law Judge, found that petitioner's pro-

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[1] Although petitioner's executive vice-president professed at the unfair labor practice hearing to be "open to anything," he also responded to the question whether he would allow the Union to discuss any factors other than merit with the explanation that "they knew it was merit" and that the merit system was the way petitioner had "always done it" for nearly 25 years without any complaint from employees (Pet. App. A50; Tr. 168).

posals, considered as a whole, represented a demand for retention of "*total control* over virtually every significant aspect of the employment relationship," while eliminating the Union's statutory right to notice and an opportunity to bargain over changes in terms and conditions of employment and its freedom to strike over even violations of the law (Pet. App. A19-A20, A50, A51; emphasis in original). Given the various restrictions on employees' statutory rights and the absence of any express limitation on management authority that would make the grievance procedure applicable, the Board found that the Union's participation in the wage review process "would be limited to observation, suggestion or prayerful entreaty" (*id.* at A49). The Board noted that in testimony at the unfair labor practice hearing and through statements made during the period of bargaining, petitioners' representatives manifested a mind-set closed both to serious consideration of changes in the system for determining wage rates (*id.* at A50) and to acceptance of the Union's role as a spokesman for employee grievances (*id.* at A50 n.18). The Board also found that the totality of petitioner's proposals "if accepted, would have left the Union and the employees with substantially less rights and protection than they would have had if they had relied solely upon the certification" (*id.* at A55). The Board concluded that "the evidence adduced by General Counsel, consisting primarily of [petitioner's] bargaining proposals and positions, *but also viewed in the light of statements indicative of* [*petitioner's*] *attitude toward collective bargaining*, is sufficient to establish that [petitioner] entered into bargaining with no real intention of concluding a final and binding collective bargaining agreement"

(*id.* at A49; emphasis in original), and therefore that petitioner had "engag[ed] in 'surface bargaining' in violation of Section 8(a)(5) and (1) of the Act," 29 U.S.C. 158(a)(5) and (1) (Pet. App. A51, A56).

3. The court of appeals enforced the Board's order (Pet. App. A3-A18). It defined the issue as whether "the content of [petitioner's] bargaining proposals together with the positions taken by [petitioner] are sufficient to establish that it entered into bargaining with no real intention of concluding a collective bargaining agreement" (*id.* at A10). The court agreed with the Board that petitioner's proposals, read together, "would have left the Union and the employees with substantially fewer rights and less protection than they would have had if they had relied solely upon the Union's certification" (*id.* at A16; citation omitted). It also noted that petitioner had responded to the Union's objections to its initial management rights proposal and its zipper clause by proposing even broader clauses on those subjects (*ibid.*). Petitioner's manner of bargaining on those two proposals, the court observed, was "clearly" an indication that it "had little desire to work towards agreement"; and the court also concluded that the Board "correctly inferred bad faith" from petitioner's "unusually harsh and unreasonable" proposals, considered as a whole (*id.* at A8, A16).

ARGUMENT

Petitioner does not take issue with the Board's conclusion, upheld by the court of appeals, that its collective bargaining proposals, taken as a whole, would have left the employees with fewer rights than they enjoyed simply as a consequence of the Board's certification of the Union as their bargaining repre-

sentative. Rather, petitioner asserts (Pet. 4-6) that under no circumstances may the Board base a finding of a violation of Section 8(a)(5) of the Act simply on the content of the proposals an employer insists on as the price of an agreement, so long as none of the proposals is in itself illegal.[2] But the question whether the Board is subject to such an inflexible rule in determining whether a party is bargaining in good faith is not presented on this record, because in this case there was evidence, *in addition to* the final proposals themselves, indicative of a mind-set incompatible with a desire to reach agreement with the Union. Moreover, contrary to petitioner's contention (Pet. 5-6), the decision below is not inconsistent with decisions of this Court or the law of other circuits.

1. Section 8(a)(5) and Section 8(d) of the Act, 29 U.S.C. 158(a)(5) and (d), together impose the duty to bargain in good faith by meeting at reasonable times and conferring "in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement." Section 8(d) also provides that the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." Construing

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[2] Petitioner took a somewhat different position in the court of appeals, where it stated (C.A. Br. 36): "A-1 does not contend that under no circumstances, as a matter of law, can a set of proposals, by their language alone, without other acts or conduct, constitute sufficient evidence of intent not to reach agreement. A-1 submits, however, that there would have to be something outrageous, egregious and hostile about proposals advanced and insisted on which is not suggested to exist in this case before mere proposals, without other conduct, constitute surface bargaining."

that provision of Section 8(d), this Court has held, in *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409 (1952), that bargaining for a management rights clause cannot be held a per se violation of the Act, and it has held, in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), that the Board lacks the power to remedy a violation of the duty to bargain with an order that the violator agree to a particular contract clause.

This Court has recognized, however, that Congress intended to impose on both negotiating parties a duty "to confer in good faith with a desire to reach agreement" (*NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 488 (1960)), and that "the Board has been afforded flexibility to determine * * * whether a party's conduct at the bargaining table evidences a real desire to come into agreement" (*id.* at 498). The Court has never held that the Board is barred from inferring from the totality of a party's proposals that it has no genuine desire to reach an agreement and from concluding that the party thereby violates the good faith bargaining obligation imposed by the Act. Indeed, Justice Harlan, in his concurring opinion in *H.K. Porter*, specified that he joined the Court's opinion restricting the Board's remedial power "on the understanding" that nothing said in the opinion would disturb the Board's "primary determination" that the employer "did not bargain in 'good faith,' and thus may be subjected to a bargaining order enforceable by a citation for contempt if the Board deems such a proceeding appropriate" (397 U.S. at 109-110).

In accordance with this Court's decisions, the Board seeks to avoid stepping over the line into regulation of the terms of a labor agreement, and thus

will not fault an employer for mere "hard bargaining." *Chevron Chemical Co.*, 261 N.L.R.B. 44, 46 (1982). In view of its duty to determine whether a party is bargaining with a genuine desire to reach agreement, however, the Board has stated that "unusually harsh, vindicative, or unreasonable proposals may be deemed so predictably unacceptable as to warrant the evidentiary conclusion that they have been proffered in bad faith" (*id.* at 46 n.10). See also *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 610 (7th Cir. 1979). In the present case, both the Board and the court of appeals found that petitioner's total package of proposals was less advantageous to the Union than simply retaining the rights flowing from certification alone. The Board also found that petitioner's representatives had made statements regarding the wage system and about the employees' ability to talk directly to management about grievances that were indicative of bad faith (see pages 3, 4 note 1, *supra*), and the court of appeals noted that petitioner's approach to bargaining on the management rights clause and the zipper clause was to submit second proposals that were more sweeping than its original proposals (see pages 3, 4, 6, *supra*). On this record, the Board did not run afoul of this Court's admonitions against undue intrusion into the bargaining process when it concluded (Pet. App. A49; emphasis in original) that "the evidence adduced by General Counsel, consisting primarily of [petitioner's] bargaining proposals and positions * * * *viewed in the light of statements indicative of* [*petitioner's*] *attitude toward collective bargaining*, is sufficient to establish that [petitioner] entered into bargaining with no real intention of concluding a final and binding collective bargaining agreement."

2. The decisions cited by petitioner (Pet. 8-13) as presenting a conflict appropriate for resolution by this Court are all distinguishable from the present case.

In *Struthers Wells Corp.* v. *NLRB*, 721 F.2d 465 (1983), the Third Circuit criticized the Board for predicating a finding of a Section 8(a)(5) violation on an employer's negotiating proposals in three specific areas (merit wage increase reviews, posting and bidding procedures, and work jurisdiction); by inferring bad faith from those three lawful proposals, the court held, the Board disregarded this Court's admonition against compelling contractual concessions and sitting " 'in judgment upon the substantive terms of collective bargaining' " (721 F.2d at 470, quoting *American National Insurance Co.*, 343 U.S. at 404). In *Struthers Wells*, however, there was no evidence of conduct other than the content of the contract proposals; for example, in contrast to the present case, there were no statements by management representatives suggesting bad faith, and the employer did not change its proposals for the worse during the course of bargaining. Moreover, the employer in *Struthers Wells* was offering increases in various fringe benefits in exchange for its request for modifications of the existing bargaining agreement that would give it unilateral control over wage increases and certain working conditions. *Struthers Wells Corp.*, 262 N.L.R.B. 1080, 1085 (1982). The court of appeals in *Struthers Wells* thus did not confront a case in which the proposed agreement would leave the employees less well off than they would be if no agreement were reached and in which other evidence indicative of bad faith was adduced.

In *United Steelworkers* v. *NLRB*, 441 F.2d 1005 (D.C. Cir. 1970),[3] as petitioner notes (Pet. 11), the court remanded for reconsideration a case in which the Board, in the court's view, had improperly weighed the economic benefits offered by the employer against the waivers of employee rights demanded by the employer (441 F.2d at 1009-1010); but the court took care not to disagree with the proposition that the Board would be within proper bounds in concluding that a proposal is " 'so disadvantageous * * * as to call into question [an employer's] willingness to sign any agreement' " (*id.* at 1010; citation omitted). Moreover, in *NLRB* v. *Blevins Popcorn Co.*, 659 F.2d 1173 (1981) (on contempt), the District of Columbia Circuit has made it clear that it does not accept the inflexible rule for which petitioner here contends; the court there stated that "[r]igid adherence to disadvantageous proposals may provide a basis for inferring bad faith" (*id.* at 1188; citations omitted). Judge Tamm, the author of the opinion in *United Steelworkers*, concurred in the *Blevins* result; while he emphasized that adamant insistence on a bargaining position could not, in itself, constitute bad faith so long as there is " '*some* reasonable effort in *some* direction' " (659 F.2d at 1191, quoting *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir.), cert. denied, 346 U.S. 887 (1953) (emphasis in original)), he cited with apparent approval a commentator's suggestion that where findings of a failure to bargain in good faith are predicated on a party's substantive positions, they generally occur in those cases in which " 'the employer is insisting upon

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[3] Petitioner cites this decision by the name of the companion case, *NLRB* v. *Florida Machine & Foundry Co.*

a set of terms which would place the employees and the union in a worse (or no better) economic position than had there been no contract at all' " (659 F.2d at 1192, citing R. Gorman, *Basic Text on Labor Law* 489 (1976)).[4]

In three of the Ninth Circuit cases relied on by petitioner (Pet. 9-10), the court stated that the Board can never make a finding of a failure to bargain in good faith on the basis of the terms of contract proposals alone. *Pittsburgh-Des Moines Corp.* v. *NLRB*, 663 F.2d 956, 959 (1981); *Seattle-First National Bank* v. *NLRB*, 638 F.2d 1221, 1226 (1981); and *NLRB* v. *Pacific Grinding Wheel Co.*, 572 F.2d 1343 (1978).[5] It is not clear, however, that even this proposition represents the law of the circuit; in *NLRB* v. *Mar-Len Cabinets, Inc.*, 659 F.2d 995

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[4] In *NLRB* v. *Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982), the only questions before the court were whether an employer's unilateral cessation of payments to an employee fringe benefits fund violated Section 8(a)(5) and (1) of the Act and, if so, whether the Board had improperly failed to consider whether there had been subsequent bargaining to impasse that would terminate the employer's ongoing liability. The remarks on which petitioner relies (691 F.2d at 1026 n.5) are pure dictum.

[5] The Ninth Circuit did not, in *NLRB* v. *Tomco Communications, Inc.*, 567 F.2d 871 (1978), make that same sweeping statement, although it did fault the Board for improperly sitting in judgment on the desirability of the employer's proposals. 567 F.2d at 883-884. The court distinguished various surface bargaining cases, including *NLRB* v. *Johnson Manufacturing Co.*, 458 F.2d 453 (5th Cir. 1972), on which the court of appeals in the present case strongly relied (Pet. App. A16-A17), by stating (567 F.2d at 883) that those cases all involved "much more aggravated behavior on the part of management than is present here."

(1981), a Ninth Circuit panel, although advising caution "in inferring motivation from proposal content," nonetheless observed that "proposal content supports an inference of intent to frustrate agreement where, as here, the entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible." *Id.* at 999.

In any event, even if the law of the Ninth Circuit were that the Board cannot find a failure to bargain in good faith on the basis of a party's proposed contract terms alone, that principle, as we noted, would not require a different result in this case. As we have shown, in this case both the Board and the court of appeals relied on evidence of bad faith in addition to the terms of the proposals insisted upon. Although the court in *Pacific Grinding Wheel* said that proposals alone could not warrant a bad faith finding, it agreed that the record as a whole supported the Board's conclusion that the employer had not bargained in good faith. In the other two cases, the circumstances were clearly unlike those of the present case. In *Pittsburgh-Des Moines*, the court simply disagreed with the Board's finding that the employer had reneged on a tentative agreement and then advanced new and more regressive proposals in its place; the court concluded that the evidence showed that the union's claim that a contract had been agreed upon was unwarranted and that the union had thereafter unreasonably refused to listen to the employer's explanations of its positions. 663 F.2d at 959-960. In *Seattle-First National Bank*, the Board had found that the "economic aspects" of the employer's offer were "not niggardly," but it had inferred

bad faith from the employer's proposals "in non-economic areas" (241 N.L.R.B. 753, 760-762 (1979)); the court found this an inadequate basis for a finding of refusal to bargain in good faith, and it remanded the case for consideration whether other evidence in the case, when added to the findings based on proposals, would support an ultimate finding of bad faith.[6]

Thus, in none of the cases on which petitioner relies did the court of appeals confront the question whether bad faith could be inferred from a set of proposals that might fairly be characterized as less advantageous than no contract at all in a context of other evidence of bad faith. The opinions of the Ninth Circuit and the other courts of appeals indicate that, on such a record, they would be prepared to uphold a finding of a failure to bargain in good faith. There is, accordingly, no conflict requiring resolution by this Court.

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[6] After remand from the Ninth Circuit, the Board concluded there was no additional evidence of bad faith, and it dismissed the complaint. *Seattle-First National Bank*, 267 N.L.R.B. No. 142, 114 L.R.R.M. (BNA) 1072 (Aug. 26, 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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